

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DARIUS AND IRINA KASPARAITIS</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 819395</b>
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Tax under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the Years 1997, 1998	:	
and 1999.	:	

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Petitioners, Darius and Irina Kasparaitis, c/o Gandler, 878 Ridge View Way, Franklin Lakes, New Jersey 07417, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1997, 1998 and 1999.

The Division of Taxation (“Division”) appearing by Mark F. Volk, Esq. (Peter B. Ostwald, Esq., of counsel) brought a motion for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) on the ground that petitioners failed to file a petition for a hearing within 90 days of the date of issue of the conciliation order. Petitioners appeared by Bingham & McCutchen LLP (Anthony J. Carbone, Esq., of counsel). The Division submitted a notice of motion and the affirmation of Peter B. Ostwald, Esq., with attachments, including the affidavits of Carl DeCesare and Bruce Peltier, in support of its motion. Petitioners filed the affirmation of Anthony J. Carbone, Esq., and a memorandum of law in opposition to the motion on April 9, 2004, which date began the 90-day period for the issuance of this determination.

Upon review of the pleadings, this Administrative Law Judge's prior order dated July 17, 2003, and all documents presented in support of and in opposition to the motion, Gary R. Palmer, Administrative Law Judge, renders the following determination.

***ISSUES***

I. Whether the Division's instant motion should be denied because it constitutes an improper attempt to reopen this proceeding in contravention of the July 17, 2003 order.

II. Whether the Division is entitled to summary determination on the ground that the petition for a hearing before the Division of Tax Appeals was untimely filed.

***FINDINGS OF FACT***

1. On November 23, 2001 the Division issued to petitioners a notice of deficiency imposing New York State and New York City personal income taxes plus interest for the years 1997, 1998 and 1999.

2. Petitioners filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") in protest of the notice of deficiency.

3. A conciliation conference was held on July 11, 2002, and a conciliation order was issued to petitioners on November 22, 2002 denying the request and sustaining the statutory notice.

4. A petition was filed in protest of the conciliation order by petitioners' representatives on February 21, 2003.

5. On March 17, 2003, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a notice of intent to dismiss petition to petitioners and the Division, which notice explained that a petition must be filed within 90 days from the date of issue of the

conciliation order, and that the notice was issued because it appeared that the petition was filed 91 days after the conciliation order was issued.

6. In the order of July 17, 2003, this Administrative Law Judge withdrew the notice of intent to dismiss petition and accepted the petition for a hearing on the merits because the mailing records submitted by the Division did not establish that petitioners' previous representative, Joel Brill, CPA, had been served with a copy of the conciliation order, which service is required before a statute of limitations will begin to run.

7. Attached to the affidavit of Mr. DeCesare is a five-page assessments receivable certified record for non-presort mail, commonly known as a certified mail record ("CMR"), along with other documents relating to the mailing of the conciliation order. In his affidavit, Mr. De Cesare states that he is the Assistant Director of BCMS. He then proceeds to describe the Division's general procedure for preparing and mailing conciliation orders.

8. Mr. Peltier, in his affidavit, states that he has been a Mail and Supply Supervisor in the Registry Unit of the New York State Department of Taxation and Finance since March of 1999, and as such is familiar with the operations and procedures of the Mail Processing Center. Findings of Fact "9" through "16" are derived from the affidavits of Mr. DeCesare and Mr. Peltier.

9. All conciliation orders mailed within the United States are sent by certified mail. The Data Management Services Unit of BCMS prepares the final copy of each conciliation order and its accompanying cover letter. The computer-generated conciliation order and cover letter are predated with the anticipated date of mailing. Using electronically stored data, the Advanced Function Printing Unit ("AFP") assigns a certified mail control number to each order and

produces a cover sheet that contains the following information: the BCMS return address, the anticipated date of mailing, the taxpayer's name and mailing address, the control number assigned by BCMS (the "CMS" number), the certified mail control number and a corresponding certified mail control number bar code. The AFP Unit produces the computer-generated CMR which is a listing of taxpayers and representatives to whom conciliation orders are to be sent by certified mail on a particular day. The certified mail control numbers are recorded on the CMR under the heading "CERTIFIED NO."

10. The Data Management Services Unit forwards the conciliation order and cover letter to BCMS where they are reviewed and signed by the appropriate conciliation conferee. The conferee then forwards the signed conciliation order and cover letter to a clerk assigned to process conciliation orders. The AFP Unit forwards the CMR and cover sheet to a printer located in BCMS where these documents are delivered to the BCMS clerk assigned to process conciliation orders.

11. The BCMS clerk associates each cover sheet provided by the AFP Unit with the appropriate conciliation order and cover letter. The clerk verifies that the information on the cover sheet, the conciliation order and the cover letter are the same. All three documents are then folded and placed in a three-windowed envelope which allows the BCMS return address, the certified mail control number, the bar code and the name and address of the taxpayer to show.

12. The CMR, along with the envelopes to be mailed that day, are picked up in the BCMS office by an employee of the Division's Mail Processing Center. A staff member weighs and seals each envelope and places postage and fee amounts on the envelopes. Thereafter, a mail

processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the CMR. Once the envelopes are stamped, a member of the Mail Processing Center staff delivers them to a branch of the USPS in the Albany area. A postal employee affixes a postmark and his or her initials to the CMR as evidence of receipt by the USPS. The CMR becomes the Division's record of receipt by the USPS for the items of certified mail listed on that document. In the Division's ordinary course of business, the CMR is picked up at the post office the next business day and delivered to the originating office by a Mail Processing Center staff member.

13. In his affidavit Mr. DeCesare states that the copy of the five-page CMR attached to his affidavit is a true and accurate copy of the original. Portions of the CMR have been redacted to protect the confidentiality of the taxpayers listed thereon. The CMR originally contained a list of 47 conciliation orders to be issued by the Division on November 22, 2002. Of these 47 pieces of mail, 3 were segregated from the 47 due to some form of defect and held for issuance at a future date. References to these 3 conciliation orders were redacted from the CMR leaving a total of 44 pieces of mail listed and received at the USPS on November 22, 2002. The 44 certified mail control numbers on the CMR do not run consecutively. Petitioners' names and address appear on page 1 of the CMR with the certified mail control number 7104 1002 9739 0142 1542 appearing next to their names. Mr. Brill's name and address appear on page 4 of the CMR with certified mail control number 7104 1002 9739 0142 1856.

14. Each of the five pages of the CMR is postmarked with the date, November 22, 2002, by the Stuyvesant Plaza branch of the USPS in the Albany, New York area. At the bottom right of page 5 of the CMR, the number "44" is hand written and circled next to the initials of the

USPS employee and below the area marked “total pieces received at post office.” The fact that a Postal Service employee wrote the number of pieces listed on the CMR to indicate the total number of pieces of mail received at the post office was established through the affidavit of Mr. Peltier based on his knowledge that the Division’s Mail Processing Center requested that Postal Service employees either circle the total number of pieces of mail received or indicate the total number of pieces received by writing the total number of such pieces on the CMR.

### ***SUMMARY OF THE PARTIES’ POSITIONS***

15. The Division claims that it is entitled to summary determination in its favor with regard to the notice of deficiency at issue because petitioners failed to file a petition for a hearing within 90 days of the issuance of the conciliation order as required by Tax Law § 170(3-a)(e).

16. Petitioners oppose the Division’s motion, asserting that this Administrative Law Judge’s order dated July 17, 2003 directed a hearing on the merits, and because the Division failed to file an exception to the order with the Tax Appeals Tribunal within 30 days of the date of the order, the order is final as to the timeliness issue. Petitioners argue too, that the Division’s motion is an improper attempt to reopen the timeliness issue, which application must be supported by newly discovered material evidence which could not have been presented at the earlier proceeding despite the exercise of due diligence.

### ***CONCLUSIONS OF LAW***

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of

fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6]).

In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006 [6]).

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by “tendering sufficient evidence to eliminate any material issue of fact from the case” (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may reasonably be drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. The Administrative Law Judge’s order of July 17, 2003 addressed the question of the timeliness of the petition which had been raised by the Petition Intake, Review and Exception Unit of the Division of Tax Appeals at the behest of the Supervising Administrative Law Judge, on his own motion, by the issuance of a notice of intent to dismiss petition in accordance with 20 NYCRR 3000.9(a)(4). The notice of intent to dismiss petition invited written comments from the parties. Because the Division, in its response to the notice, did not include proof of mailing of the conciliation order to petitioners’ previous representative, Mr. Brill, this Administrative

Law Judge, in the July 17, 2003 order, withdrew the notice of intent to dismiss petition and accepted the petition for a hearing on the merits.

C. Petitioner contends that the July 17, 2003 order was a final order, and because the Division failed to file a timely notice of exception with the Tax Appeals Tribunal, the Division is now foreclosed from reopening the proceeding respecting the timeliness of the petition.

D. The notice of intent to dismiss petition is essentially a motion to dismiss the petition brought by the Supervising Administrative Law Judge on his own motion. This Administrative Law Judge denied the motion to dismiss by the order of July 17, 2003. 20 NYCRR 3000.9(a)(3) provides that a determination of an Administrative Law Judge denying a motion to dismiss is not subject to review by the Tax Appeals Tribunal. 20 NYCRR 3000.5(f), which applies to motion practice before the Division of Tax Appeals generally, reads, in part, as follows:

(f) Review. An order by an administrative law judge on any motion which does not finally determine all matters and issues contained in the petition, for purposes of review by the tribunal, shall not be deemed final and conclusive until the administrative law judge shall have rendered a determination on the remaining matters and issues.

The July 17, 2003 order is a non-final order that is not subject to review by the Tax Appeals Tribunal.

E. Tax Law § 2006(6) and 20 NYCRR 3000.9(b)(1) permit any party, following joinder of issue, to file a motion for summary determination as of right. It follows that the Division was entitled to file its motion for summary determination. Tax Law § 170(3-a)(e) provides that a conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days after the date of issuance of such order. The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals, which



has no authority to consider a petition that is filed more than 90 days after the date of issuance of the conciliation order (*Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

F. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

The affidavits of the two Division employees, Carl DeCesare and Bruce Peltier, provide adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders like the one mailed to petitioners by certified mail. The affidavits generally describe the various stages of producing and mailing conciliation orders and, in addition, attest to the authenticity and accuracy of the copies of the conciliation order and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the DeCesare and Peltier affidavits were followed with respect to the conciliation order issued to petitioners. Petitioners' names and address appear on the first page of the certified mail record which bears a USPS postmark dated November 22, 2002. The name and address of petitioners' representative, Mr. Brill, appears on page 4 of the CMR. There are 44 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated that he or she received a total of 44 items for mailing. In short, the Division has

established that it mailed the conciliation order to petitioners and their representative, Mr. Brill, by certified mail on November 22, 2002, and 91 days before the February 21, 2003 mailing date of the petition.

G. Because the petition was not mailed or otherwise filed within 90 days of the date of issuance of the conciliation order, the Division of Tax Appeals lacks jurisdiction to consider the petition on its merits.

H. There being no material and triable issues of fact, the Division's motion for summary determination is granted.

I. As petitioners' counsel has correctly indicated in his response to the Division's instant motion, his clients are not without recourse in this matter. Petitioners may pay the disputed tax and, within two years of payment, file a claim for refund in accordance with Tax Law § 689(c). Should the refund claim be denied, petitioners may then proceed by filing a timely petition for a hearing to contest the refund denial.

J. The petition of Darius and Irina Kasparaitis is dismissed.

DATED: Troy, New York  
July 1, 2004

/s/ Gary R. Palmer  
ADMINISTRATIVE LAW JUDGE